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IN THE

SUPREME COURT OF THE UNITED STATES

No. 953

APRIL TERM, 1941

313 US #19
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KEARNS COAL CORPORATION,
Petitioner,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Counsel for Petitioner.

New York, April 10, 1941.

Appeal Printing Co., Inc., 130 Cedar St., New York

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UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully alleges:

I. That on March 3, 1941, the Circuit Court of Appeals for the Second Circuit reversed a judgment which had been entered in the District Court of the United States for the Southern District of New York in favor of the plaintiff (petitioner herein) and against the defendant (respondent herein) for the sum of $18,300.50

and directed a dismissal of the complaint. The judgment below also dismissed the defendant's counterclaim and that portion of the judgment dismissing the counterclaim was affirmed by the Circuit Court of Appeals. The judgment below was obtained after a trial before District Judge Harold P. Burke and a jury. The opinion of the Circuit Court of Appeals is printed at the end of the record. Petitioner is unable to specify the page because this petition is being prepared at the same time as the record is being completed by the insertion of the opinion. A petition for rehearing was denied without opinion on April 2, 1941. The references below are to folios of the Record.

A

Summary statement of the matters involved

II. Petitioner, Kearns Coal Corporation, is a retail coal dealer. In 1933 it owned three trucks of its own and when it had more business than its own trucks could handle, Pagano, the office manager of Kearns Coal Corporation, would call up Newton Contracting Company and ask them to send up a truck and driver, specifying the date when they would be needed (ff. 131-134, 157). The wages of the driver were paid by Newton which also furnished the gasoline and paid for repairs and storage of the truck (ff. 135, 174). Kearns Corporation paid Newton $30 a day for nine hours' work of the truck and driver starting at seven o'clock in the morning and ending at five o'clock at night, with one hour for lunch (f. 135).

On December 31, 1933, Kearns Corporation was using one of the Newton Company trucks driven by a man named Williams (ff. 287, 288). A little after four

o'clock in the afternoon, Pagano, the office manager of Kearns Corporation, handed Williams a delivery ticket showing that he was to deliver a load of coal to Acker & Son at 6 West 190th Street, New York City. Pagano told Williams that this was his last delivery and to come back in the morning (ff. 151, 289). The truck was loaded by a helper employed by Kearns Corporation, who went with the truck to the place of delivery and unloaded the coal (f. 290). No instructions were given Williams by Kearns Corporation as to the route he was to take or how he was to drive, nor was he instructed by them what he was to do with the truck after the last delivery was made or where it was to be stored (ff. 152, 294).

Williams drove the truck with its load of coal to 6 West 190th Street, dumped the coal on the sidewalk, and drove away, leaving the helper to shovel the coal into the customer's premises (ff. 290, 291). He started for the garage where he had been instructed by Newton Contracting Company to store the truck (f. 319). At about 5:15 P. M., while en route to the garage, the truck ran into a sled on which a boy, William Pasley, was coasting, causing serious injuries to the boy which necessitated the subsequent amputation of his leg (ff. 293, 1156).

At the time of the accident two relevant automobile liability policies were in existence, one issued by respondent, United States Fidelity & Guaranty Company, and one by Travelers Insurance Company. The policy issued by respondent named as assured Newton Contracting Co. Inc. and/or The Hastings Pavement Company (Ex. 1—f. 976, Declarations, item 1). In this policy respondent agreed:

> "Sec. I. To pay all sums which the Assured shall became liable to pay as damages imposed upon

him by law for bodily injury * * * accidently sustained by any person or persons if caused by the ownership, maintenance or use of any automobile disclosed in the declarations for the purposes therein stated; * * *."

Sec. II (1) provides:

"The unqualified word 'Assured' includes not only the Named Assured but any other person or organization while using any such automobile, including also any other person or organization responsible for the use thereof, provided the disclosed and actual use of such automobile is 'Pleasure and Business', or 'Commercial' each as defined herein and further provided that such use is with the permission of the Named Assured, * * *."

By Sec. II(4)(a) the Company further agrees:

"To defend in his name and behalf any suit against the Assured, seeking damages on account of such bodily injury * * *, even if such suit is groundless, false or fraudulent * * *."

In Item 3 of the Declarations the business of Newton Contracting Co. Inc. is given as "paving contractor".

Item 10(b) provides:

"The term 'Commercial' when used is defined as the transportation or delivery and the loading and unloading of goods and merchandise in direct connection with the Assured's occupation as expressed in Item 3."

Section IV of the policy provides:

"This policy shall exclude any obligation of the company * * *.

(b) Under any of the above Agreements while any disclosed automobile is rented to others or used for livery purposes or for carrying passengers for a consideration."

The policy is also made subject to the following condition:

> "(d) If the Named Assured has concurrent insurance covering a loss also covered hereby, the Company shall be liable * * * only for the proportion of such loss which the sum hereby insured bears to the whole amount of valid and collectible concurrent insurance. If any other Assured has valid and collectible insurance against a loss also covered by this Policy, such other Assured shall not be insured under this Policy."

While the business of Newton was given in the policy as "paving contractor" the general agent of the insurance company who issued the policy knew at the time it was issued that the trucks were being used to carry coal (ff. 387, 388) and with the policy was issued a certificate of insurance addressed to Stephens Fuel Co. Inc., another retail coal dealer, notifying it that the policy was in force and agreeing to notify Stephens Fuel Company of any cancellation of or change in the policy (Ex. 19, f. 1102), which indicates knowledge by the insurer that the truck was to be used to carry coal for others (ff. 366, 367).

The policy issued by Travelers Insurance Company effective June 15, 1933, named Kearns Coal Corporation as assured with limits of 40,000/80,000 on liability for personal injuries. This policy (Ex. I, f. 1237) covered a specified truck by description and also by attached rider 1500 was extended to include "all hired automobiles and trailers used by the assured during the policy period for the purposes stated in the declarations, * * *."

This same rider 1500 contains the following provision:

> "It is further agreed that if there exists, at the time of a loss covered by this Policy, a policy of

> insurance under the terms of which the Named Assured is entitled to protection and coverage against such loss, then the insurance afforded by this policy shall be excess insurance over and above the amount of such other valid and collectible insurance."

On January 5, 1934, an action was brought by William Pasley through his guardian *ad litem* to recover damages for personal injuries and by Anna Pasley, his mother, to recover for loss of services and expenses, the damages claimed being $100,000 for the boy and $50,000 for his mother (ff. 982-1000). Kearns Coal Corporation, Newton Contracting Co. Inc. and George Williams were all three named as defendants, the complaint alleging that defendant Kearns Coal Corporation had been using the truck owned by defendant Newton Contracting Company "as bailee for hire or otherwise" and that Williams at the time of the accident was operating the truck "with the knowledge, approval and acquiescence of all of the defendants and in the scope of his employment for the defendants" (ff. 989, 990).

The Travelers took the position that its policy was an excess policy under the above quoted provision of rider 1500 and that the owner's policy issued by respondent was primarily liable, and suggested to Kearns Corporation and also to respondent, United States Fidelity & Guaranty Company, that the latter should appear and defend the Pasley action on behalf of Kearns Corporation. This, after some demur, the respondent did and on February 14, 1934, it appeared in the Pasley action on behalf of the defendant Kearns Corporation, having previously appeared for defendants Newton and Williams (f. 681). No reservation of rights was made by respondent and the testimony shows and the jury specifically found that at the time it assumed the defense of

said action on behalf of Kearns Corporation it had knowledge of all the facts and circumstances relative to the custody, control and management of the truck at the time of the accident and also knowledge of the terms and conditions of the Travelers policy relative to its coverage on hired automobiles (ff. 1312, 1313).

Respondent employed its own attorneys, Jenkins, Dimmick & Finnegan to appear on behalf of all three defendants (ff. 398, 410). It continued in full control of the defense of the Pasley action on behalf of Kearns Corporation until October 24, 1934, a period of more than eight months (ff. 37, 38). In the meantime on March 14, 1934 Mr. John J. Kearns, then President of Kearns Coal Corporation, was examined before trial with respect to the control and operation of the truck at the time of the accident (ff. 449, 580, 583). Mr. O'Rourke, a young attorney in the office of Jenkins, Dimmick & Finnegan, acted as counsel for Kearns Coal Corporation on the examination as well as for the other two defendants (ff. 447, 458). Although under the New York decisions it was extremely doubtful whether Kearns Coal Corporation had any supervision or control of the truck at the time of the Pasley accident, Mr. Kearns was not advised of this, nor in fact did counsel have any discussion of the law or facts with him prior to the examination (ff. 468, 476, 480). Moreover, despite the fact that the witness was totally without advice on the law, plaintiff's attorney was permitted upon the examination to ask him, without objection, whether the truck was under the supervision and control of Kearns Coal Corporation at the time of the accident, to which questions he gave an affirmative reply (ff. 461, 496). He gave this very damaging testimony under the erroneous impression, which counsel had failed to correct, that the giving of orders as

to where the truck was to deliver coal legally constituted supervision and control (ff. 584-595).

Thereafter on October 24, 1934, more than eight months after it had assumed the defense of the Pasley action, the defendant United States Fidelity & Guaranty Company disclaimed liability as to Kearns Coal Corporation on the ground that through the examination of Mr. Kearns (held on March 14th) it had come to its attention that the automobile involved in the accident was rented to Kearns Coal Corporation at the time of the accident. The papers in the action were returned to Kearns Coal Corporation with a suggestion that the matter be given its preferred attention as a motion for preference had been granted and the case might be reached for trial within the next week or ten days (ff. 1036-1041). The Kearns Company refused to accept the disclaimer and through its counsel demanded that the United States Fidelity & Guaranty Company continue with the defense of the action, which the latter refused to do (ff. 1043-1047).

The Travelers Insurance Company thereupon assumed the defense of the Pasley action on behalf of Kearns Coal Corporation with the specific stipulation that by so doing it did not waive any claim that it or Kearns Coal Corporation had against Newton Contracting Company or United States Fidelity & Guaranty Company. The Travelers consistently maintained its position that its policy was an excess policy and that the Kearns Coal Corporation was covered first by the United States Fidelity & Guaranty Company policy (ff. 1073-1076, 1081).

The Pasley action was tried and a verdict of $100,000 was rendered against all three defendants. This verdict was set aside by the trial court as excessive (ff. 1109-1111). On appeal from the order setting aside the ver-

dict the order was affirmed (ff. 1255-1259). Just before the argument of the appeal the United States Fidelity & Guaranty Company paid $15,000 to the attorneys for the Pasley plaintiffs and obtained a discontinuance of the Pasley action as to Newton Contracting Company and George Williams and releases running to Newton Contracting Company, George Williams and United States Fidelity & Guaranty Company (ff. 830, 833, 1297). A second trial was then had which resulted in a verdict of $36,600 against Kearns Coal Corporation, the sole remaining defendant (ff. 1015, 1016). Judgment was entered on the verdict and execution issued and Pagano, as an officer of Kearns Coal Corporation, was examined in supplementary proceedings (ff. 176, 1070). Kearns Coal Corporation demanded of United States Fidelity & Guaranty Company that it either pay the judgment, or bond the judgment and take an appeal, but it refused to do either (Exs. 11, 12, 13, f. 1048, et seq.). Thereafter the Travelers advanced $15,000 to Kearns Coal Corporation under a loan agreement specifically stating that the advance was without prejudice to its position that the Travelers policy did not cover the loss except as an excess policy (ff. 1084, 1096). Kearns Coal Corporation then paid $15,000 to the Pasleys in settlement and obtained a satisfaction of the judgment (ff. 182, 184, 1063, 1069).

Thereafter this action was commenced by Kearns Coal Corporation to recover the sum of $15,000 paid in settlement of the Pasley action, plus the reasonable charges of its own attorneys in connection with the defense of that action, which on the trial were stipulated to be $500 (f. 731). The defendant in addition to the denials and affirmative defenses in its answer set up a counterclaim for the amount of $15,000 which it had paid for the release of Newton Contracting Company

and George Williams, claiming that it was entitled to recover this amount as subrogee of Newton Contracting Company.

The trial court submitted to the jury written interrogatories together with appropriate forms for a general verdict pursuant to Article 49 (b) of the Federal Rules of Civil Procedure (ff. 942, 964, 1312). The jury answered the written interrogatories and found specifically (1) that the truck at the time of the accident was not under the custody, control and management of the Kearns Coal Corporation; (2) that the Fidelity & Guaranty Company at the time it assumed the defense of the Pasley actions for Kearns Coal Corporation had knowledge of all the facts and circumstances relative to the custody, control and management of the truck at the time of the accident; (3) that the Fidelity & Guaranty Company at the time it assumed the defense of the Pasley actions for Kearns Coal Corporation had knowledge of the terms and conditions of the Travelers policy relative to its coverage on hired automobiles; and (4) that Kearns Coal Corporation was prejudiced or its position was adversely affected by the fact that the Fidelity & Guaranty Company undertook the defense on its behalf of the Pasley actions in February, 1934, and continued the defense until October, 1934 (ff. 1312, 1313).

It also found that plaintiff was entitled to recover on its claim against defendant and that defendant was not entitled to recover on its counterclaim (f. 1313). Upon the answers to the special questions and the general verdict the court directed judgment in favor of plaintiff dismissing the counterclaim and for the sum of $15,500 with interest (ff. 1310, 1316).

The Circuit Court of Appeals reversed the judgment and directed a dismissal of the complaint on the grounds

that (1) the plaintiff was in no event insured under the policy issued by the defendant, (2) the defendant, as a matter of law, was not estopped to deny that its policy covered the plaintiff, and (3) there was no evidence to support the jury's finding of actual prejudice, and the issue of prejudice should not have been submitted to the jury.

B

III. The following are the questions presented for review by this Court:

1. Was the decision of the Circuit Court of Appeals that as a matter of law respondent was not estopped to deny coverage to petitioner under its automobile liability policy contrary to the law of New York as laid down by the New York decisions?

2. Was there an issue of fact for the jury whether petitioner was prejudiced or its position adversely affected by the respondent's assumption and conduct of the defense of the Pasley actions on behalf of petitioner?

3. Was petitioner an "additional assured" under the respondent's policy?

C

IV. Reasons relied on for the allowance of the writ.

1. That the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. This decision stands alone in the State of New York in holding that where an insurance company issuing a liability policy assumes the defense of an action against its insured without reservation and with full knowledge of all the mate-

rial facts and continues in sole charge of such defense for a period of more than eight months, there is not even an issue of fact as to whether prejudice to the insured has resulted which will support an estoppel.

Petitioner further alleges (2) that in setting aside the verdict of the jury in favor of the plaintiff and in particular the specific finding of the jury that the respondent was actually prejudiced and its position adversely affected by the assumption and conduct of the defense of the Pasley actions by respondent on behalf of petitioner, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein, and that the order of the Circuit Court of Appeals, in so far as it reverses the judgment of the District Court in favor of petitioner and directs a dismissal of the complaint, may be reversed by this Honorable Court and the judgment of the District Court herein reinstated, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

New York, April 10, 1941.

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

No.

APRIL TERM, 1941

KEARNS COAL CORPORATION,
Plaintiff,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The essential facts have been stated in the petition and we do not repeat them here for reasons of brevity.

Jurisdiction

The jurisdiction of the District Court was based on grounds of diversity of citizenship. Jurisdiction to review the decision of the Circuit Court of Appeals is conferred on this Court by Judicial Code, Section 240A as amended (43 Stat. 938).

Specification of Errors to Be Urged

1. The Circuit Court of Appeals erroneously decided as a matter of law that respondent was not estopped to deny coverage to petitioner under its automobile liability policy (Ex. 1, f. 976).

2. The Court below erred in setting aside the finding of the jury in answer to one of the written interrogatories that petitioner Kearns Coal Corporation was prejudiced or its position was adversely affected by the fact that the respondent, United States Fidelity & Guaranty Company, undertook the defense on petitioner's behalf of the Pasley actions in February 1934 and continued the defense until October 1934, and in holding that this did not form an issue of fact for the jury to determine.

3. The Court below erroneously decided that the liability clauses of the policy operated in connection with the accident to the Pasley boy only for the benefit of the Newton Company and not for that of petitioner.

ARGUMENT

A

The decision of the Court below that as a matter of law respondent was not estopped to deny coverage to petitioner under the policy was contrary to the New York law.

The rule in New York is that where an insurer under a liability policy appears in an action by an injured party on behalf of the insured through its own attorneys and thereby assumes the control of the defense of that action without reservation and with full knowledge of

the material facts, the insurer may not thereafter disclaim liability and is estopped to deny coverage to the insured even where the accident was one not covered by the policy.

In *Rosenbloom* v. *Maryland Cas. Co.*, 153 App. Div. 23, defendant had defended an employee's action for injuries, flowing from a breach of plaintiff's statutory duties, but thereafter disclaimed liability. The court said at page 25:

> "The defense mainly relied upon is that the injury for which Goldstein recovered judgment was not a liability insured against by the terms of the policy. Whether it was or not is perhaps open to question but that question we are not called upon to consider. As has already been said the complaint in the Goldstein case disclosed precisely the nature of his claim and the ground upon which he sought to hold the owners liable, so that when the defendant assumed the defense of the action it had every means of ascertaining whether or not the loss was one for which it was liable under its policy. It is perfectly well settled that under such circumstances, an insurer who has, with full knowledge, undertaken the defense of an action, and deprived the assured of any control of it, will be deemed estopped to deny that the accident was within the terms of the policy."

This rule has been followed and applied in the following decisions of the New York Court of Appeals.

Rosenwasser v. *Globe Indemnity Co.*, 224 N. Y. 561;

Gerka v. *Fidelity & Casualty Co.*, 251 N. Y. 51, 57;

Utterbach Gleason Co. v. *Standard Acc. Ins. Co.*, 193 A. D. 646; affirmed 233 N. Y. 549.

The court below recognizes this to be the rule in New York and other states where the insurer has retained control of the insured's defense to final judgment or to a settlement. It holds, however, that the rule does not apply where the insurer has withdrawn at a time and under circumstances where the insured is left an adequate opportunity to defend. We find no decision which sustains the distinction made by the court below and we do find decisions to the contrary.

In *Sachs* v. *Maryland Cas. Co.,* 170 App. Div. 494, 496, the defendant had originally undertaken the defense of plaintiff in an employee's suit for injuries, but later abandoned the defense, asserting non-liability. Plaintiff took over the defense and successfully defended the action and then sued for his expenses. The insurer defended on the ground that the insured was not liable to the employee and that the accident was not one covered by the policy. The court held defendant liable on the ground that having undertaken the defense and excluded the insured, it could not thereafter assert that the claim was not covered by the policy.

See also:

Miller v. *Union Indemnity Co.,* 209 A. D. 455, 457; affirmed without opinion 240 N. Y. 627;
269 Canal St. Corp. v. *Zurich Co.,* 226 A. D. 516, 518; affirmed without opinion 252 N. Y. 603.

In *Fairbanks Canning Co.* v. *London Guarantee & Acc. Co.,* 154 Mo. App. 327, the insurance company undertook the defense of the negligence action and conducted it for about ten months. It then took the deposition of the plaintiff and his mother and disclaimed before trial on the basis of facts brought out on those depositions. Plain-

tiff took over the defense and negotiated a settlement. The court held that the defendant was estopped to deny coverage.

The cases cited by the court below in support of its position do not sustain it.

In *Lavine* v. *Indemnity Insurance Co. of North America*, 260 N. Y. 399, which is referred to in the opinion as "most nearly analogous" to the case at bar, the record on appeal shows that the summons and complaint in the negligence action were served upon the insured on August 10, 1929, and were received by the defendant insurance company about a week or ten days later. The defendant never appeared nor answered on behalf of the insured in that action and on September 12, 1929, about three weeks after it received the papers in the negligence action, it disclaimed all liability. Defendant's counsel in their brief on appeal stressed the point that defendant had neither appeared nor answered.

The same is true of *Weatherwax* v. *Royal Indemnity Co.*, 250 N. Y. 281, and *Kitsap County Transp. Co.* v. *Pacific Coast Cas. Co.*, 67 Wash. 297, the other cases cited by the court below. In neither case did the insurer appear or answer on behalf of the insured in the negligence action. There was, therefore, no election or agreement to undertake the defense of the action pursuant to the policy, nor any basis for a claim of estoppel by reason of the insurer having undertaken such defense.

Mason-Henry Press v. *Aetna Life Insurance Company*, 211 N. Y. 489, and *Joseph Gordon, Inc.* v. *Massachusetts Bonding Co.*, 229 N. Y. 424, also cited by the court below, are readily distinguishable on the facts. In the *Mason* case the insurer undertook the defense with the express reservation, of which it notified the insured,

that if it developed on the trial that the injured employee was under the legal age of employment the insurance company would not be liable (see opinion pp. 494, 496). In the *Gordon* case there was a similar reservation of rights by the insurer and there was also a deliberate misrepresentation of facts by the insurer. In the case at bar there was no reservation of rights by the insurer and no misrepresentation of the facts by the insured.

The New York decisions above cited which hold that an insurer is estopped to deny coverage to the insured under a liability policy where it has assumed the defense of a personal injuries action on behalf of the insured are based on a familiar theory of estoppel.

In *Rothchild* v. *Title Guarantee & Trust Co.*, 204 N. Y. 458, the rule is stated as follows:

> "When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable. (Vohmann *v.* Michel, 185 N. Y. 420; 2 Pomeroy's Equity Jurisprudence (3d. ed.) sections 816-821, 965)."

The rule is based on a theory of election. In the most recent case cited above, *Gerka* v. *Fidelity & Cas. Co.*, 251 N. Y. 51, at page 57, the Court of Appeals states, speaking of the insurer:

> "When it proceeded with the defense of the negligence action, with knowledge of its claimed defense under the policy, it made its election and estopped itself from now urging that defense."

The other decisions above cited in support of the rule are to the same effect. The election referred to takes place not after settlement or final judgment, but when the insurance company with full knowledge of the material facts and without reservation assumes the defense of the negligence action on behalf of the insured. It applies, therefore, to the facts in the case at bar.

The question of law thus presented is an important one to that vast army of automobile owners and users who rely upon liability insurance for protection against claims for personal injuries in the event of accident. When an insurance company, after investigation and with knowledge of the circumstances of the accident, undertakes the defense of an action against the insured, the insured is entitled to assume that he will be protected. He loses all control over the conduct of the defense and over any negotiations for settlement. The defense is handled by attorneys employed by the insurance company, in many cases their regular employees, whose personal interest lies primarily with that of the insurance company. If the insurer is to be permitted to conduct the defense through its preliminary stages and then disclaim liability on the basis of facts which were known to it at the time that it assumed control, it may be difficult for the insured to prove actual prejudice where that prejudice nevertheless exists. The decision of the court below stands alone in New York State in holding that there is no resulting prejudice to the insured under such circumstances *as a matter of law*, and no issue of prejudice to be submitted to the jury.

B

There was ample evidence to support the jury's finding that actual prejudice resulted to petitioner from respondent's conduct of the defense of the Pasley action on its behalf.

When the respondent United States Fidelity & Guaranty Company undertook the defense of the Pasley actions on behalf of petitioner, Kearns Coal Corporation, it had already assumed the defense of those actions on behalf of the defendants Newton Contracting Co. Inc., the owner of the truck, and Williams, the driver. At that time it was perfectly apparent to respondent that hostile interests existed as between these three defendants as well as between the two insurance companies. The only way in which the interests of the defendants would cease to be hostile and become similar would be if they were to be covered by the same insurer. Being fully aware of this situation, the respondent nevertheless employed one firm of attorneys to represent all three defendants and one answer was put in on behalf of all three (ff. 448, 452, 1002). This was in itself a representation to petitioner, Kearns Coal Corporation, and its officers, as well as to the attorneys employed by respondent to defend the Pasley action on behalf of the three defendants, that hostility of interest no longer existed and that the respondent intended to cover all three. There is no other theory on which the same attorneys could properly have been employed to carry on a joint defense.

On March 14, 1934, about a month after the appearance on behalf of petitioner had been filed, the attorney for the Pasleys examined the officers of the corporate

defendants before trial, including Mr. Kearns, the president of petitioner. The examination, as stated in the notice, was to be with respect to the operation and control of the truck.

Under the New York decisions it was at that time very doubtful whether any liability on the part of the defendant Kearns Coal Corporation could be established. The Court of Appeals had held in a number of decisions that where a truck and driver are used to deliver coal or some other commodity for another at an hourly or daily rate, they are as a matter of law not under the supervision and control of the person for whom deliveries are being made, but remain in the service of the general employer.

In *Charles* v. *Barrett*, 233 N. Y. 127, one Steinhauser was in the trucking business. He furnished the defendant Adams Express Company with a motor van and chauffeur at the rate of $2 an hour. The defendant did the work of loading at its station and unloading at the railroad terminal. It sealed the van at the point of departure and unsealed it at the point of destination. Between departure and destination the truck remained without interference in charge of the chauffeur. While on such a trip it struck and killed the plaintiff's son. The Court of Appeals affirmed the dismissal of the complaint by the Appellate Division and said at page 129:

> "We think that truck and driver were in the service of the general employer. There was no such change of masters as would relieve Steinhauser of liability if the driver of the van had broken the seals, and stolen the contents. By the same token, there was no such change as to relieve of liability for other torts committed in the conduct of the enterprise. Where to go and when

might be determined for the driver by the commands of the defendant. The duty of going carefully, for the safety of the van as well as for that of wayfarers, remained a duty to the master at whose hands he had received possession. Neither the contract nor its performance shows a change of control so radical as to disturb that duty or its incidence * * *. The rule now is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division (McNamara v. Leipzig, 227 N. Y. 291; Matter of Schweitzer v. Thompson & Norris Co., 229 N. Y. 97; Meade v. Motor Haulage Co. Inc., 233 N. Y. (527); Driscoll v. Towle, supra)."

See also:

Meade v. *Motor Haulage Co. Inc.,* 197 A. D. 930, affirmed 233 N. Y. 527;

Cattini v. *American Railway Express Co.,* 202 A. D. 336, affirmed 234 N. Y. 585;

Lipshitz v. *Fitzpatrick, Inc.,* 234 N. Y. 592;

Wagner v. *Motor Truck Renting Corp.,* 234 N. Y. 31;

Kellogg v. *Church Charity Foundation,* 203 N. Y. 191;

Hanrahan v. *N. Y. Edison Co.,* 212 A. D. 295;

Moore v. *Stainton,* 80 A. D. 295, affirmed 177 N. Y. 581.

In *Meade* v. *Motor Haulage Co.* (*supra*) the truck and driver owned by defendant were hired by Burns Brothers, retail coal dealers, at $30 per day for use in their business of delivering coal and were engaged in

carrying a load of coal at the time of the accident. The facts in the case do not appear in the official report, but are set forth in the later case of *Cattini* v. *American Railway Express Co.* (*supra*) at page 352 of the opinion.

Under the above decisions it was extremely doubtful whether petitioner would have been liable to the Pasleys even if the accident had happened while the truck and driver were engaged in delivering coal. The non-liability was even clearer in this case in which the truck had made its last delivery and was on its way back to the garage to which it had been directed to return by the general employer, Newton Contracting Co.

> *Bohan* v. *Metropolitan Express Co.*, 122 A. D. 590, 594.

The attorney who represented Kearns Coal Corporation and the other defendants on the examination and who knew that Mr. Kearns was to be examined on the question of supervision and control of the truck at the time of the accident did not advise Mr. Kearns as to the legal status of Kearns Coal Corporation or as to what under the New York decisions legally constituted supervision and control of the truck and driver. Moreover, knowing that Mr. Kearns had not been advised on the law he permitted him, without objection, to answer questions calling for his conclusion on the very question which was to be decided by the court or jury upon the trial, namely, whether the truck and driver were under the supervision and control of Kearns Coal Corporation at the time of the accident.

Mr. Kearns told the truth according to his lights, but he could not have answered correctly the questions put to him on the examination unless he had a correct understanding of the law. Being a layman, he was not familiar

with the decisions above cited and the testimony shows that he understood that if a truck and driver were hired to carry coal for petitioner by the day and he told the driver where he was to take and deliver his load of coal, the truck and driver were under the supervision and control of petitioner, Kearns Coal Corporation, during that day (ff. 593, 595). His testimony on the examination before trial that the truck was under the supervision and control of petitioner at the time of the accident was based on this erroneous understanding of the law.

Moreover, although the questions were objectionable as calling for a conclusion on the part of the witness and an objection as to form could have been made on that ground, the defendant's attorney failed to make any objection. The court below decided that no real prejudice resulted from this failure to object "for it is obvious that the questions could and would have been reframed to elicit substantially the same testimony." The whole purpose of the objection, however, would have been to compel the questions to be asked in proper form and not in a form calling for a conclusion of the witness. When the objection was made to these questions upon the reading of the examination at the trial, the Pasley attorney, Mr. Weltz, argued with considerable force that no objection had been made upon the examination and that if objection had been made he would have asked questions in a different form (ff. 549, 550). If proper objection had been made at the time of the examination, as it should have been, the examination would have brought out the facts and not the witness's erroneous conclusion as to the facts. As a result of this conduct of the examination the attorney for the Pasleys obtained not the facts and circumstances as to the arrangement between Newton and Kearns and as to what the truck and driver were

engaged in doing at the time of the accident on which, under the decisions, no liability on the part of petitioner could have been predicated, but a virtual admission of liability on the part of Kearns Coal Corporation based on an erroneous assumption of supervision and control where supervision and control did not exist, as the jury in this case specifically found.

The reason for this apparent laxity on the part of defendant's counsel on the examination before trial and for his failure to advise Mr. Kearns as to the legal status of petitioner may be traced directly to the respondent's employment of one firm of attorneys to represent all three defendants. Under such circumstances, with the respondent defending on behalf of all defendants, it made no difference under whose supervision and control the truck and driver were at the time of the accident. If any defendant was liable the insurance company had to pay. When the respondent later disclaimed liability to petitioner on the ground of the erroneous conclusion elicited upon this very examination, however, the question whether the truck and driver were under the supervision and control of the petitioner became of vital importance. At that time the damage had been done. Petitioner, or Travelers Insurance Company, if you will, had to defend the action with this damaging and erroneous testimony in the record.

That this testimony was highly damaging there can be no doubt. In fact the jury were entitled to infer that without this testimony of Kearns on the examination before trial no judgment would have been obtained against Kearns Coal Corporation. The court upon the trial of the Pasley action reserved decision on the motions to dismiss at the close of the plaintiff's case and at the close of the entire case (ff. 686, 687) and after the verdict was handed down made the following statement:

> "The Court: I have some doubt as to the propriety of the verdict in connection with the control of this truck, so far as the Kearns Coal Corporation is concerned."

The plaintiff's attorney then urged the testimony of Kearns and Brown on the examination before trial, stating (f. 694):

> "Both of them unequivocally almost in effect stipulated and agreed that the supervision and control at the time of the accident was in the Kearns Coal. There is no question about that."

The Court then asked:

> "Did they say at the time of the accident?"

to which Mr. Weltz replied:

> "Absolutely" (f. 695).

The following request to charge and ruling therein was also made on the Pasley trial (f. 689):

> "Mr. Weltz: I ask your Honor to charge the jury that they have a right to consider in connection with the question of whether the truck was under the supervision of the Kearns Coal Company, the direct testimony of Mr. Kearns in the examination before trial, wherein he admitted that at the time of the accident the truck was under Kearns Coal Company's supervision, together with the other evidence in the case.
>
> The Court: Whatever evidence there is, gentlemen, in the case, you are entitled to take into consideration."

With these facts in the record as to the conduct of the defense of the *Pasley* action while it was under the de-

fendant's control, we contend that a finding that no actual prejudice resulted to petitioner would have been contrary to the evidence. The court below, however, has decided that as a matter of law there was no evidence of prejudice. We submit that this decision is not only in conflict with the local decisions, but constitutes such a departure from the accepted and usual course of judicial proceedings as to call for this Court's exercise of power of supervision.

C

Petitioner was an additional assured under the policy of insurance.

Section II (1) of respondent's policy, which defines the word "assured", provides coverage to one using the insured automobile with the permission of the named assured, or responsible for the use thereof, only in the event that such use was in direct connection with the assured's occupation as expressed in Item 3 of the policy. The truck in question had on the day of the accident (although not at the time of the accident) been carrying coal. The court below decided that such use was not in direct connection with assured's occupation of paving contractor, and concluded that "the liability clauses of the policy operate, in connection with this accident, only for the benefit of the Newton Company, not for that of plaintiff."

The Court overlooked the fact that the agreement to insure the named assured against claims for personal injuries contained in Section I of the policy is likewise limited to injuries sustained by any person or persons "if caused by the ownership, maintenance or use of any

automobile disclosed in the declarations for the purposes therein stated." The purposes stated in the declarations for which the disclosed automobiles were to be used are "commercial" (Item 10) which in turn is defined as the transportation or delivery and the loading and unloading of goods or merchandise in direct connection with the assured's occupation of paving contractor expressed in Item 3.

In other words, if the policy covered the risk at all, it covered Kearns Coal Corporation as well as Newton Contracting Company and Williams. It is true that if the truck was not under the supervision and control of petitioner at the time of the accident, then petitioner could not be held liable. It is likewise true that if Williams was not negligent, Newton Contracting Co. Inc. could not be held liable. The claim was that the truck was being operated by Kearns Coal Corporation at the time of the accident and that Williams was negligent. If this claim was correct, then Kearns Coal Corporation was liable as well as Newton. The agreement in the policy was not only to pay if the assured was liable, but also, Section II(a), "to defend in his name and behalf any suit against the Assured seeking damages on account of such bodily injury or property damage even if such suit is groundless, false or fraudulent." The word "assured" in that section includes an additional assured as well as a named assured.

If the use of the truck to carry coal for Kearns was a "rental to others" within the meaning of the exclusion clause in the policy, or if the use of the truck at the time of the accident was not in direct connection with the insured's occupation as expressed in the policy, in either case this would have excluded coverage of the named assured Newton, as well as the additional assured Kearns.

Respondent knew this and with knowledge of all the material facts undertook the defense of the Pasley actions on behalf of Newton, Williams and Kearns. This constituted an estoppel to deny coverage thereafter, which applied to the additional assured Kearns, as well as to the additional assured Williams or to the named assured Newton. An additional assured stands precisely as a named assured so far as the rights and duties of an insurer are concerned and the rights of an additional assured may be predicated on an estoppel the same as those of a named assured.

> *Sauriolle* v. *O'Gorman,* 86 N. H. 39, 48, 49;
> *Horn* v. *Commonwealth Cas. Co.,* 105 N. J. L. 616;
> *Peterson* v. *Maloney,* 181 Minn. 437, 442.

Coverage itself may be predicated upon an estoppel and an insurance company may be held liable to a named assured or an additional assured because of prejudicial conduct on the part of such insurer, even where the risk involved was specifically excluded under the terms of the policy.

> *General Tire Co.* v. *Standard Acc. Ins. Co.* (C.C.A. 8th Cir.), 65 Fed. (2d) 237, and cases cited under A (*supra*), pp. 15 and 16.

It is needless to speculate as to why respondent chose to extend coverage and undertake the defense of the Pasley actions and not to rest on any claim that the risk was excluded. There was evidence of knowledge on the part of the insurance company at the time the policy was issued that the use of the trucks was not to be limited to the business of paving contractor and the issuance of the certificate of insurance to Stephens Fuel Co., another retail coal dealer, indicated a knowledge that the trucks

were to be used to carry coal for that company. There was no difference in the risk whether coal was carried for Stephens Fuel Company or Kearns Coal Corporation.

Moreover, the meaning of the term "rented to others" is not entirely clear. It was at least doubtful whether it would be held to apply to a case where a truck and driver were used to carry coal for another.

See:

Roadbuilders' Hauling Co. v. *Constitution Indemnity Co. of Philadelphia,* 165 S. C. 363, 366.

The New York Court of Appeals had indicated in a recent decision that the proviso in Section 59 of the New York Vehicle & Traffic Law, which excludes from liability as owner of a motor vehicle under the statute "any person * * * renting or leasing motor vehicles to be operated on the public highway who carries approved liability insurance insuring the renter against liability arising out of his negligence in operating such motor vehicle," does not apply where the automobile, though hired by a third person, is being operated by the servant or employee of the owner.

Atkins v. *Hertz Drivurself Stations, Inc.,* 261 N. Y. 352, 359.

There was also considerable authority, as indicated in the opinion of the Court below, for the Travelers' position that its policy constituted excess insurance. Moreover, respondent did not decide to undertake the defense of Kearns upon receipt of the letter from the Travelers dated February 6, 1934, as stated in the court's opinion. It had agreed to undertake the defense on behalf of

Kearns at the time of the second conversation between Campbell and Dwyer, which was prior to the writing of that letter (ff. 783, 784). At that time, so far as the testimony shows, there had been no discussion or suggestion of any inability to obtain further time to answer or of any possibility of a default.

Respondent undertook the defense of the Pasley action on behalf of petitioner advisedly and in its own interest, because of the possibility that it might be liable to petitioner under the policy. Having waived any questions of exclusion in the case of Newton and Williams, there was no particular reason why it should assert them in the case of Kearns, and by appearing for Kearns it gained exclusive control of the defense. Having deliberately and advisedly and with full knowledge of the facts assumed that defense, it then proceeded so to conduct it as to make it difficult, if not impossible, for Kearns Coal Corporation to successfully defend, where previously it had had an excellent chance of obtaining a dismissal. Having permitted Mr. Kearns, through lack of proper advice and protection, to testify to erroneous conclusions as to the relationship of petitioner to the truck and driver, respondent later disclaimed liability to petitioner, alleging as the ground of disclaimer these same erroneous conclusions. This, under the decisions above cited, it was estopped from doing as a matter of law. At the very least, however, there was a question of fact as to such estoppel, which was properly submitted to the jury, and having been decided by them in favor of petitioner was improperly set aside by the Court below.

Conclusion

We respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the serious and important questions of law which have been decided by the court below contrary to the New York law and in such a manner as to constitute a departure from the accepted and usual course of judicial proceedings may be corrected and properly decided by this court, and that to such end the petition for a writ of certiorari should be granted.

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 953

KEARNS COAL CORPORATION,

Petitioner,

against

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM DIKE REED,
WILLIAM J. MCARTHUR,
Counsel for Respondent.

New York, May 1st, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 953

KEARNS COAL CORPORATION,

Petitioner,

against

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This brief is filed by respondent in opposition to a petition by the plaintiff, Kearns Coal Corporation, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Petitioner seeks a review in this Court of a judgment of said Circuit Court of Appeals entered in the above entitled action on April 3, 1941, which reversed a judgment of the District Court of the United States for the Southern District of New York, in favor of the plaintiff in the sum of $18,300.50 and directed a dismissal of the complaint.

The opinion of the District Court is printed at page 437 of the record. The unanimous opinion of the Circuit Court of Appeals for the Second Circuit, written by CLARK, Circuit Judge, in which Circuit Judges SWAN and CHASE concurred is printed at pages 444-452 of the record and is reported in 118 F. (2d) 33.

Questions Presented

1. Was the plaintiff-petitioner an "additional assured" within the terms of the policy of the United States Fidelity & Guaranty Company, without relying on an estoppel to fall within such definition?

2. As a matter of law under the New York decisions, must prejudice to an assured be established before an estoppel may arise against an insurance company which withdraws from the defense of an assured at a time and under the circumstances where the insured is left with an adequate opportunity to defend the action?

3. Under all of the circumstances in this case, has the Kearns Coal Corporation presented facts sufficient to entitle it to make any claim of estoppel?

No question of constitutional or statutory construction is involved. No conflict between the different Circuits of the United States Courts is presented.

Statement of Facts

The United States Fidelity and Guaranty Company, a liability insurance company, on the 30th day of August, 1933, delivered to the Newton Contracting Company, Inc., its policy of insurance No. A-822487, wherein said Newton

Contracting Company, Inc., and/or Hastings Pavement Co., were named as assured (ff. 11, 35-37, Ex. 1, R. 326).

While this policy was in force, a certain Mack truck described therein, after making deliveries of coal to plaintiff's customers and while being driven back to the garage on the 31st day of December, 1933, collided with a sled on which one William Pasley, eleven years old, was riding, causing him serious injuries. Thereafter, on the 5th day of January, 1934, William Pasley, by Anna Pasley, his guardian *ad litem*, and Anna Pasley, individually, commenced an action against the Kearns Coal Corporation, the Newton Contracting Company and others.

The Kearns Coal Corporation, in turn, had its own policy of automobile liability insurance with the Travelers Insurance Company, in which it was a named assured. That policy had a "Hired Automobiles Endorsement" thereon for which the plaintiff paid $1,500 as an estimated advance insurance premium covering automobiles hired by the Kearns Coal Corporation. This policy was taken out on June 27th, 1933 (Ex. I, R. 413).

The defendant denied any liability to the plaintiff because of provisions, conditions and exclusions contained in the insurance policy issued by the defendant to its assured, Newton Contracting Company, all of which are referred to at length in the following points. Primarily, defendant contended that plaintiff did not come within the definition of an "additional assured" as defined in defendant's policy. Defendant's answer also set up the fact that at the time of the accident to the Pasley boy, the described automobile was rented to the plaintiff by the Newton Contracting Company, and the defendant's policy excluded any liability "while any disclosed automobile is rented to others."

When this accident occurred, the Kearns Coal Corporation at once realized the obligations and liabilities of the Travelers Insurance Company to defend it and be responsible for any judgment which might be obtained in the *Pasley* action. On the very day that the accident to the Pasley boy occurred, the Kearns Coal Corporation by A. J. Pagano, office manager, wrote a letter reporting the accident to H. Waltemade, Inc., the insurance broker through whom Kearns Coal Corporation obtained the policy in the Travelers (Ex. O, R. 417). This letter of December 31, 1933, was promptly forwarded to the Travelers (Ex. S, R. 423).

Henry Waltemade wrote to the Travelers Insurance Company on January 2nd, 1934, referring to the Kearns Coal Corporation's insurance Policy No. FA-7482553 and asked the company to "give same your immediate attention and acknowledge receipt of this report."

The summons in the case of *Pasley* v. *Kearns Coal Corporation, et al.* was served January 5th, 1934 on the Kearns Coal Corporation. It was promptly sent by letter to and received by the Travelers Insurance Company (Ex. T, R. 424).

When Alexander Campbell, a Claim Department employee of the Travelers received a second letter from Henry Waltemade, dated January 8, he telephoned Mr. Pagano of the Kearns Coal Corporation "sometime after" and told him that in his opinion the Kearns Coal Corporation was entitled to protection under another policy of insurance (ff. 765-766).

On being pressed further as to what he said, Campbell answered:

> "Well, I told Mr. Pagano that there was other protection in addition to ours available to them * * * and I suggested to Mr. Pagano that it would be to their best interests to refer the summons to the owner of the automobile" (ff. 767-768).

When this employee, Campbell, made these statements to the manager of his company's assured, the Kearns Coal Corporation, he had never even seen the policy of the Newton Contracting Company, the owner of the automobile (f. 770). Evidently, upon the insistence of Campbell, the Pasley summons served on Kearns Coal Corporation was sent to the Newton Contracting Company, and, by it, forwarded to the United States Fidelity and Guaranty Company.

We have a letter, dated January 16, 1934, from the defendant to its agent, the County Agencies Inc. (Ex. 23, R. 377), and a letter from the County Agencies Inc., to the Kearns Coal Corporation returning the summons in the *Pasley* action (Ex. 24, R. 377). The letter written by this agent of the United States Fidelity and Guaranty Company which returned the summons to the Kearns Coal Corporation states as the reason for its return that no coverage was afforded to the plaintiff (Ex. 24, R. 377).

On January 23, 1934, Henry Waltemade, Inc., on behalf of the Kearns Coal Corporation for the second time forwarded the summons in the action of *Pasley* v. *Kearns Coal Corporation, et al.* to the Travelers Insurance Company with a letter, dated January 23, 1934. This letter asked the Travelers to give the matter their "immediate attention" but that company failed to appear (Ex. U, R. 425).

Once again, and finally for the third time, the summons in the action of *William Pasley, an infant, et al.* v.

Kearns Coal Corporation, et al. was forwarded to the Travelers Insurance Company by Henry Waltemade, Inc. (Ex. V, R. 426).

And again, the Travelers Insurance Company refused to appear for its named assured, and so refusing, forwarded the summons served on the Kearns Coal Corporation to this defendant. In their letter of February 6, 1934, the Travelers' manager wrote that "the plaintiff's attorney states that he will not grant any further extension of time for Kearns to appear after February 12, 1934" (Ex. 27, R. 382, f. 1147).

The danger of a default by the Kearns Coal Corporation in filing its notice of appearance and answer became imminent. The Travelers Insurance Company had refused three times to accept the summons sent to it by its insurance policy holder, the Kearns Coal Corporation. Mr. Campbell of the Travelers assured a representative of the Fidelity Company that the Travelers insurance policy did not cover the Kearns Coal Corporation in this particular case (ff. 765-766). No copy of this Travelers policy was forwarded to the company's representative (ff. 398-399, 413). Thereupon, under the pressure of a possible default being taken against the defendant, Kearns Coal Corporation, the Fidelity Company designated the attorneys, Jenkins, Dimmick and Finnegan, who appeared in the *Pasley* action and served an answer to the plaintiffs' complaint on its behalf (answer of defendant Kearns Coal Corporation verified February 21, 1934, Ex. 5, R. 334).

These attorneys took over the defense of the Kearns Coal Corporation and exercised all professional care and skill for a period of approximately eight months, from the filing of its answer on February 21, 1934, to October 24,

1934. It then returned the papers in the *Pasley* case to the Kearns Coal Corporation and disclaimed any liability to that corporation under its policy of insurance No. A 822487 which it had issued to the Newton Contracting Company. During this period of eight months and later, both insurance companies conducted investigations as to the occurrence of the accident (ff. 817-822). An examination before trial of the presidents of the Kearns Coal Corporation and Newton Contracting Company and the driver of the motor truck at the time of the accident was held pursuant to an order of a justice of the New York Supreme Court (ff. 1195-1196, 1217, Ex. E, R. 399, 406).

Ray L. Walker, superintendent of the Claim Department of the United States Fidelity and Guaranty Company, read the testimony taken before trial of Messrs. Kearns, Brown and Williams, and ordered a new investigation (f. 817). On the basis of a new statement made by A. J. Pagano, dated October 15, 1934 (Ex. K, R. 415-416), the testimony of the above witnesses, the reinvestigation of the case and upon the opinion of counsel for the Fidelity Company, Mr. Walker ordered this final disclaimer of liability (ff. 816-837, Ex. 9, R. 346-347).

The Travelers received the papers in the *Pasley* action which were returned to the Kearns Coal Corporation by the defendant and referred the defense in said action to E. C. Sherwood, attorney, at 100 East 42nd Street, New York, N. Y. At this time Mr. Sherwood was substituted as attorney for the Kearns Coal Corporation and took over its defense in the *Pasley* action. The Fidelity Company had designated the firm of Jenkins, Dimmick and Finnegan, attorneys, which appeared in the *Pasley* action on behalf of the co-defendants Newton Contracting Company and George

Williams. While the action was still pending, the Fidelity Company settled the Pasley claims as against these two defendants for the total sum of $15,000. This settlement was duly authorized by Honorable LLOYD CHURCH, Justice of the New York Supreme Court, on January 6th, 1937 (Ex. G, R. 409-411).

E. C. Sherwood, as attorney for the remaining defendant, Kearns Coal Corporation, then amended its answer by setting forth as a separate, distinct and partial defense in mitigation of damages that there had been paid on behalf of the defendants Newton Contracting Company and George Williams to the plaintiff William Pasley, an infant, and to Anna Pasley, individually, the total sum of $15,000 on account of the injuries and damages sustained by reason of the accident for which their action was still pending against the Kearns Coal Corporation (Ex. H, R. 412).

The *Pasley* action was first tried in March, 1935. Verdicts were rendered in favor of the plaintiffs which were set aside by the Trial Judge. Upon that first trial, however, the defendant Kearns Coal Corporation moved for a dismissal of the complaint and for the direction of a verdict in its favor. This motion was denied by the Trial Justice on the 22nd day of May, 1935 (Ex. R, R. 421-422).

Defendant Kearns Coal Corporation thereupon appealed from that part of the order of Justice CHURCH which denied its motions for the dismissal of the complaint and for the direction of a verdict in its favor. This appeal was argued by counsel for the defendant Kearns Coal Corporation urging that it was entitled to a dismissal of the complaint and the direction of a verdict in its favor. The Appellate Division, First Judicial Department, on January 22, 1937, unanimously ordered that the order of Justice LLOYD

CHURCH so far as appealed from be affirmed, and held in effect that a question of fact was presented for the jury (Ex. Q, f. 1258, reported 249 App. Div. 806).

Finally, the *Pasley* action was again tried, from May 3 to May 7, 1937. A verdict was rendered therein for the plaintiff William Pasley, an infant, for the sum of $30,000 and for the plaintiff Anna Pasley for the sum of $6,600, as evidenced by the final judgment entered on May 12, 1937 (Ex. 5, R. 339).

This judgment adjudicated and determined that at the time of the occurrence of the accident in the underlying action the motor vehicle of the Newton Contracting Company, Inc., was operated and controlled by the Kearns Coal Corporation, its agents, servants or employees.

The Kearns Coal Corporation and the Travelers Insurance Company, more than three years after the *Pasley* action was started, entered into an agreement, on July 6, 1937, under which the insurance company advanced $15,000 to Kearns, its named assured. The receipt of this sum was acknowledged by the Kearns Coal Corporation for the sole purpose of enabling it to settle and satisfy the judgment of May 12th, 1937, which had been rendered in favor of the Pasleys against the Kearns Coal Corporation (Ex. 18, R. 362-366). The money so paid by the Travelers Insurance Company to the Kearns Coal Corporation was used in settlement and satisfaction of the Pasley judgment. A satisfaction of the judgment was duly filed on July 13, 1937, and the *Pasley* action was closed on the records of the Supreme Court, County of Bronx. For the amount so paid in satisfaction of the said judgment this action was brought.

POINT I

No principle is involved or issue presented which this Court should review or pass upon.

Whether the petitioner in this action, a retail coal dealer doing business in the County of Bronx, City and State of New York, has made out any right to claim coverage under the policy of insurance issued by the defendant on the automobile of its assured, the Newton Contracting Company, is not a question of great public concern.

According to the petitioner, a review by this Court is requested herein to determine whether on the complicated facts of this case and the voluminous record herein, petitioner has established a right to recover against the respondent (Petition, p. 11).

This Court will not grant a writ of certiorari to review evidence and discuss specific facts,[1] nor was discretionary jurisdiction conferred upon the Supreme Court merely to settle matters of private interest,[2] or to give the party defeated in the Court below another hearing.[3]

Furthermore on the merits herein, certiorari must be denied for the reason that the Circuit Court of Appeals for the Second Circuit achieved a correct result in this action.

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1 *United States* v. *Johnston*, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925; *New York Central & H. R. R. Co.* v. *Kinney*, 260 U. S. 340, 346, 43 S. Ct. 122, 67 L. Ed. 294.

2 *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 17 S. Ct. 665, 41 L. Ed. 1095.

3 *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; 43 S. Ct. 531, 67 L. Ed. 922.

POINT II

According to plaintiff's contentions and the conceded evidence, the Kearns Coal Corporation was not an "additional assured" under the defendant's policy.

The plaintiff, not being named in the defendant's policy, must first show that it was an "additional assured" within the "omnibus clause" of the defendant's policy before it can bring any action thereon. This clause (Section II, (1)) reads:

> "The unqualified word 'Assured' includes not only the Named Assured, but any other person or organization while using any such automobile, including also any other person or organization responsible for the use thereof, provided the disclosed and actual use of such automobile is 'Pleasure and Business,' or 'Commercial,' each as defined herein, and further provided that such use is with the permission of the Named Assured. * * *"

By Item 10 (b) of "Declarations," "the term 'Commercial' when used is defined as the transportation or delivery and the loading and unloading of goods or merchandise in direct connection with the Assured's occupation as expressed in Item 3." And Item 3 states: "The Assured is (a) (1) Paving Contractor (2) Mfg. Paving Blocks." (See defendant's policy, Plaintiff's Exhibit 1, R. 326.)

It is conceded that the truck in question was being used on the day of the accident, not in connection with the business of a paving contractor or manufacturer of paving blocks, but in the delivery of coal sold by plaintiff.

Thus, according to the unequivocal definition, the use was not "Commercial" within the special meaning of the policy and hence plaintiff does not fall within the definition of an "additional assured" thereof.

The purpose and scope of the extended omnibus clause (Section II, (1)) is to afford coverage under the policy where one, other than the owner, is "using" or is "responsible for the use" of the car belonging to the owner. By judicial definition the coverage afforded thereunder is aimed "to protect the public against *operation of the car by others than the owners* * * *."

Brustein v. *New Amsterdam Casualty Co.*, 255 N. Y. 137, 142;

Bakker v. *Aetna Life Ins. Co.*, 264 N. Y. 150, 151, 152;

Lavine v. *Indemnity Ins. Co.*, 260 N. Y. 399, 407.

But if the plaintiff's claims are to control, namely, that the truck at the time of the accident was being used and operated by Newton Contracting Company, and not the Kearns Coal Corporation, then plaintiff has argued itself outside of the "omnibus clause" and consequently out of the policy sued upon.

On the other hand, if plaintiff were to assume the converse position, that it did have control of the truck, then recovery under the policy must still be denied.

Section IV (b) of the defendant's policy contained the further exclusion of liability *"under any of the above agreements while any disclosed automobile is rented to others."*

Control of the truck in the Kearns Coal Corporation, in addition to the admitted fact that plaintiff paid the sum of $30.00 a day (complaint, paragraph XI, R. 6) for the use thereof, would clearly constitute a "renting." This was so charged by Judge BURKE in the present action, to which counsel for plaintiff did not except, nor request the Court to charge otherwise (ff. 929, 931). The petitioner is then guilty of a violation of the "renting" provision, in which event, recovery under the policy is excluded.

Furthermore, should plaintiff take the position that it did have control of the truck it would necessarily follow that its contention that answers were given on the examination before trial by Mr. Kearns under a "misunderstanding of the law," as to control would be without merit.

This Court will also note that Section II (1) is further expressly limited by Section V, Condition "D" excluding "any other assured" where it has other "valid and collectible insurance against a loss also covered by this policy."

It is conceded that the Kearns Coal Corporation had a policy of insurance with the Travelers Insurance Company, which was issued prior to the defendant's policy, and in which the Kearns Coal Corporation was "a named assured" (see Defendant's Exhibit I, p. 413). For all of these reasons, the plaintiff failed to show that it came within the definition of an additional assured in the policy of the respondent.

POINT III

The Circuit Court of Appeals and the District Judge properly applied the New York law necessitating a showing of prejudice before an estoppel could arise against the defendant.

The District Judge in the present action charged the jury:

> "Before the jury may find that the defendant is estopped from asserting Section IV, which excludes any liability while the disclosed automobile is rented to others, they must first find that the plaintiff suffered actual prejudice as a result of the defendant's conduct" (f. 953).

This ruling was reaffirmed by the Circuit Court of Appeals, which specifically cited the principle of *Lavine* v. *Indemnity Insurance Co., of North America* (260 N. Y. 399, 183 N. E. 897, reversing 234 App. Div. 906, 254 N. Y. S. 1000, 142 Misc. 422, 254 N. Y. S. 804), as controlling. In this case, according to the facts as found by the Trial Judge sitting without a jury, the defendant for a period of months construed the policy to cover the liability in question. It received notice of the accident from the assured shortly after the accident happened. It investigated the accident, obtained affidavits from parties, and learned of the facts constituting a defense to the action. Further, the defendant without reservation or qualification assumed the defense of the action by getting an extension of time to answer (see 142 Misc. 422, 426). The Court of Appeals reversed the judgment in favor of the plaintiff and held specifically:

> "We are unable to agree with the conclusion reached by the Trial Term that the defendant by its conduct had waived the defense now insisted upon and estopped itself from urging such defense. The defendant's conduct did not in any way prejudice the plaintiff (*Weatherwax* v. *Royal Indemnity*, 250 N. Y. 281; *Gerka* v. *Fidelity and Casualty Co.*, 251 N. Y. 51.)"

The *Lavine* case illustrates the universal rule which requires a showing of prejudice before an equitable estoppel can arise.[4]

The New York Court of Appeals decided the *Lavine* case at a time subsequent to all of the cases cited by petitioner. It constitutes the latest and most authoritative ruling by the New York Court of Appeals, on the question of estoppel. The decision reveals (p. 402) that substantially all of the arguments and cases now cited by petitioner were expressly urged upon the Court's attention in the *Lavine* case, and, notwithstanding, the Court held that a showing of prejudice was necessary. It is respectfully submitted that the general rule as applied in the *Lavine* case should be followed and certiorari be denied here.

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[4] *Knauss, Inc.* v. *Indemnity Ins. Co.*, 270 N. Y. 211, 216, 200 N. E. 791; *Draper* v. *Oswego County Fire Relief Ass'n*, 190 N. Y. 12, 16, 82 N. W. 755; *Baker* v. *Union Mutual Life Ins. Co., of Maine*, 43 N. Y. 284; *Rhodes* v. *Ocean Accident & Guarantee Corp., Ltd.*, 239 App. Div. 92, 95, 266 N. Y. S. 92, affirmed 264 N. Y. 437; 191 N. E. 502; *Glen Falls Portland Cement Co.*, 162 N. Y. 399, 405, 56 N. E. 897; *Kitsap County Transport Co.* v. *Pacific Coast Cas. Co.*, 67 Wash. 297, 121 P. 457; *Makiesky* v. *National Guardian Life Ins. Co.*, 174 Minn. 554; 219 N. W. 864; *Vance, Insurance* (1930), p. 518.

POINT IV

Petitioner has failed to show facts sufficient to entitle it to claim an estoppel.

Having established that petitioner was not an "additional assured" under the policy issued by the respondent (Point II, *supra*), it must necessarily follow that petitioner is not one who is entitled to any standing in Court to assert an estoppel against the Fidelity Company. Since the petitioner does not come within the policy as a named assured, nor as an "additional assured," the Kearns Coal Corporation was consequently a stranger to the policy issued by the defendant. A stranger may not assert an estoppel against one who owed him no pre-existing duty to act or not to act in any prescribed manner.[5]

Moreover, the petitioner has not contended at any time during the present litigation that it was in ignorance of the true facts which here constitute a defense to plaintiff's action on defendant's policy. John J. Kearns, the president of the Kearns Coal Corporation, was also the secretary of the Newton Contracting Company (ff. 562, 579, 599-601). The petitioner had the fullest knowledge concerning the use and operation of the truck at the time of the accident (ff. 302, 757; Defendant's Exhibits K and 4, pp. 415, 417). The plaintiff was expressly and promptly informed that defendant's policy did not cover the Kearns Coal Corporation. The party petitioning for estoppel must present its claim in entire good faith. But, when its officers knew all of the facts, the petitioner cannot honestly claim

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[5] *Deery* v. *Cray*, 72 U. S. 795, 803; *Empire Mfg. Co.* v. *Moers*, 27 App. Div. 464, 467; *Averill* v. *Wilson*, 4 Barb. 180, 190; *Makiesky* v. *National Guardian Life Ins. Co.*, 174 Minn. 554, 219 N. W. 864.

that the insurer's representations misled it. Consequently it may not assert an estoppel.[6]

The respondent unequivocally advised petitioner that it was not covered by the policy issued to the Newton Contracting Company. It twice returned the summons and complaint to Kearns with the explicit statement that petitioner was not covered (Plaintiff's Exhibits 23, 24, 26, pp. 375-382). Upon the failure of the Travelers Insurance Company to defend, a default was imminent (f. 1147). Not only would this have constituted irreparable damage to plaintiff, but such default, with the admission of liability implicit therein, would have embarrassed and hampered the proper defense of the Newton Contracting Company, the owner of the truck. Under these unusual circumstances, the fact that the defendant yielded after the Travelers Insurance Company had three times refused to accept the summons which the petitioner had forwarded to it, cannot be construed as an admission or representation of liability by the defendant or the "free" adoption of a contract.[7]

The petitioner wholly failed to show that it was prejudiced by the appearance of the defendant in its behalf, prior to the time of disclaimer. There was no question of fact which properly could have been submitted to a jury to support any finding of prejudice.

The only prejudice claimed by the plaintiff in respect to the *Pasley* action was the alleged improper handling of the examination before trial of the Kearns Coal Corporation

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[6] *Vance Insurance* (1930), 518-524; *Makiesky* v. *National Life Ins. Co.*, 174 Minn. 554; 219 N. W. 864.

[7] *Mason-Henry Press* v. *Aetna Life Ins. Co.*, 211 N. Y. 489, 105 N. E. 826; *Joseph Gordon, Inc.* v. *Massachusetts Bonding and Ins. Co.*, 229 N. Y. 424, 128 N. E. 204; *Fidelity and Casualty Co. of New York* v. *Stewart Dry Goods Co.*, 208 Ky. 429, 271 S. W. 444.

by John J. Kearns, its president. The motion for an examination before trial had been opposed by Vincent F. O'Rourke, one of the designated attorneys, and his filed affidavit in opposition thereto is part of Defendant's Exhibit F (R. 402). The examination proceeded on direction of Mr. Justice WASSERVOGEL of the Supreme Court, who decided that the plaintiffs were entitled to a pre-trial examination as to Items 1 and 2 of the notice which related to the question of operation and control of the truck at the time of the accident (ff. 504-505, 1195, 1217). The answer prepared by Mr. O'Rourke denied operation and control on the part of the Kearns Coal Corporation (ff. 457, 989, 990, 1003, 1004, R. 335).

Mr. Kearns was not called to testify to any questions of law. If the direct questions as to supervision and control asked of him, improperly included conclusions of law as petitioner contends, the answers thereto would have been incompetent. This being so, regardless of what answers Mr. Kearns made on the examination before trial, the New York law expressly and explicitly states that such answers must be excluded *at the time of the trial* and not upon the examination itself.

> *New York Rules of Civil Practice,* Rule 129;
> *New York Civil Practice Act,* Section 305.

These two sections have been judicially construed to mean that any objections to incompetent questions upon an examination before trial *must only* be made upon the trial and not upon the examination.

> *Guenther* v. *Ridgway Co.,* 159 App. Div. 74, 77, 143, N. Y. S. 961;
> *Brown* v. *Bedell,* 232 App. Div. 158, 249 N. Y. S. 277.

With the right to object at the trial to whatever incompetent questions were asked of Mr. Kearns upon the pre-trial examination, the petitioner cannot rightfully claim that its position was "adversely affected" by the conduct of the attorney, Mr. O'Rourke, upon the examination before trial. If the attorney, who was later designated by the Travelers Insurance Company to act for the petitioner, failed to object to such questions upon the second *Pasley* trial, then the prejudice lies in his omission. If the trial justice during that trial improperly allowed any incompetent questions then the petitioner's remedy was on appeal.

If any error was committed by the Trial Court in that action in the New York Supreme Court, it cannot now be attacked collaterally in this honorable Court. It is well established under the New York law that a failure of the Trial Court to rule on incompetent questions at the trial on objections and exceptions then taken, even for the first time, constitutes reversible error.

> *Bambauer* v. *Schleider, et al.*, 176 App. Div., 562 at 564-565.

An objection to a question calling for the conclusions of the witness would be an objection not to *form*, but to the *competency* of a lay witness to express an opinion and therefore such objection was properly reserved for the trial.

> *Merritt* v. *Briggs*, 57 N. Y. 651.

In any event, there is no foundation in this record to support the arguments of counsel for petitioner, that Mr. Kearns misunderstood the meaning of the questions as to "supervision and control." The present trial took place shortly less than six years since the attorneys for the defendant withdrew as counsel for the Kearns Coal Corpora-

tion. During this time it had its own attorneys to advise it on what actually constituted control. Yet Mr. Kearns on this trial, in answer to a question asked by Mr. Skidmore as to what he meant by an answer given upon the examination that George Williams was driving the automobile truck under his supervision answered:

> "I understood by that question that Mr. Weltz was asking me *whether or not the truck worked for me that day, and whether it was under my control for the nine days—for the nine hours which constituted a days' work at that time*" (ff. 583, 593).

Mr. Kearns there reiterated on this trial his statement that the truck was under his control. His following answer that he understood by control "where Williams was to take and deliver his load of coal," does not reveal any gross misunderstanding of what is legally meant by control but rather is consistent therewith (ff. 594, 595).

On cross examination Mr. Kearns testified that he was a witness at the second Pasley trial, and that he probably did tell the jury in that case just what he meant by the answers he made on the examination before trial (f. 596). This was substantially the view taken by the justice who presided on that trial when he said: "If the conclusion is not right, the witness (Mr. Kearns) is still available to elicit the facts, if the facts differ" (f. 557). This same witness, John J. Kearns, on the first Pasley trial testified that he understood every answer that he gave upon the pre-trial examination. (See record on appeal, p 302, f. 906, in the case of *Pasley, et al.* v. *Kearns Coal Corporation,* 249 App. Div. 806.)

No motion was ever made by petitioner during the 2½ years which elapsed between defendant's disclaimer of

liability and the second trial in the *Pasley* action, to correct any of the answers given by Mr. Kearns. Nor was leave ever requested to have the examination before trial re-opened for the purpose of taking additional testimony.

It cannot be said that upon the examination before trial Mr. O'Rourke should have advised the Kearns Coal Corporation that it did not have control of the truck. If Mr. O'Rourke had done this, he would then have been subject to the criticism that he was laying a foundation for a disclaimer under the defendant's policy in respect to the provisions of the omnibus clause. If Mr. Kearns had testified upon that examination that he was not in control then, as already demonstrated in Point II, *supra*, the Kearns Coal Corporation would not have been "using" or "responsible for the use" of the truck. In consequence it would definitely have been excluded as an additional assured under the defendant's policy. This, too, would have have necessitated a disclaimer of liability by the defendant.

Petitioner's contention that as a matter of law the Kearns Coal Corporation did not have control of the truck is incorrect and Mr. O'Rourke as an attorney could not have ethically given any such advice. The order of the Appellate Division, First Judicial Department which unanimously affirmed the refusal of the Trial Court to dismiss the Pasley's complaint as to the Kearns Coal Corporation completely vindicated Mr. O'Rourke's action in not advising petitioner that it was not in control (see 249 App. Div. 406). The petitioner here cannot possibly contend that as a matter of law Kearns was not in control, when the New York Appellate Division has held squarely that the Kearns Coal Corporation, could properly be found under the facts in this case to have been in control.

Alfred J. Pagano, office manager and chief clerk of the Kearns Coal Corporation, testified that when the coal company's business was more than their own trucks could handle "*we had to hire outside trucks. In most cases it was this particular truck owned by the Newton Contracting Company*" (f. 134).

The truck came to its place of business at seven o'clock in the morning. "Mr. Williams was told what to load, that is, in sizes of coal, and the man—and he went down the yard and he loaded them, pulled up to the scale, it was weighed, tickets were made out, sent out for delivery" (f. 140). George Williams' duties were more than that of a chauffeur. When he went out on the truck with the workmen, it was Williams who was charged with personal responsibility. He made the delivery in accordance with his orders. He collected the money due for the coal and gave a receipt therefor when the ticket was marked for C. O. D. delivery (ff. 253-256, 302, 1021, Exs. 6 and 7).

When Williams received the ticket for the last load at about four or a little after in the afternoon of December 31st, Pagano told him "to come to work the next morning at seven o'clock." After making this last delivery of coal, Williams started for the garage. Even though the work sometimes required a quarter or a half hour overtime, it was customary only to charge for nine hours (ff. 151, 289, 311).

Signs about three feet high and six feet long reading "Kearns Coal Corporation, Bronx, N. Y." were on each side of the truck. *Prima facie*, the Kearns Coal Corporation was responsible for the damages caused, on this admitted fact.[8] Directly after the accident happened, Wil-

[8] *Baldwin* v. *Abraham*, 57 App. Div. 67; affd. 171 N. Y. 677; *Stapleton* v. *Butensky*, 188 App. Div. 237; *Horowitz* v. *Daily Mirror Inc.*, 144 Misc. 99, affd. 237 App. Div. 876.

liams notified Mr. Pagano first by telephone. And, the next morning Williams went back to Mr. Pagano with the same truck and worked again for the Kearns Coal Corporation (ff. 302-304, 1247) as he was directed prior to the accident by them (f. 151).

It cannot be argued seriously by petitioner that the status of Williams' employment changed on the stroke of five o'clock, especially on the evidence herein that there was ice and snow on the streets which made the pavement slippery and much delayed the progress of the truck (ff. 314, 1251).

Under all of the New York authorities where one has an accident while on his way home from the place where he had made his last call or last delivery for the day in the business of another, it has been held that at the time of the accident such employee was still engaged in the performance of the duties for which he was employed.

Burdo v. *Metropolitan Life Insurance Co.*, 254 App. Div. 26, 28; affd. 279 N. Y. 648;
Ulm v. *Western Union Telegraph Co.*, 258 App. Div. 776; affd. 282 N. Y. 645;
Matter of Katz v. *Kadans & Co.*, 232 N. Y. 420.

These particular facts distinguish the case at bar from the cases cited by petitioner on pages 21 to 23 of his brief. In this case we have the affirmative testimony of Mr. Kearns that as part of the agreement or contract of hiring, and in consideration of the sum of $30 per day, the Newton Contracting Company was to surrender control of the truck to the Kearns Coal Corporation (ff. 458, 470, 475, 519, 520, 521, 531-533). Counsel for petitioner are careful not to allege that such questions asked on the pre-trial examina-

tion were improper. (See p. 7 of petitioner's brief.) Nor can it be denied that such questions were proper since they concerned the terms of an oral contract of hiring and were clearly a question of fact, which was determined adversely to the Kearns Coal Corporation in the *Pasley* action. There was therefore in the case at bar clearly a new relationship between Williams and Kearns Coal Corporation, since, by agreement, command had been surrendered to the petitioner.

It is a complete answer to the charge of a failure to object to questions on the examination before trial that appropriate objections were actually made upon the second *Pasley* trial as shown by the record. The learned Trial Court on that *Pasley* trial did pass upon the competency and relevancy of all of the questions which counsel in this action has sought to prove to be prejudicial. Some of the objections were sustained, and others were overruled (ff. 513, 520-533).

Another complete answer to plaintiff's contention of prejudice is that the rule excluding opinion evidence is subject to exceptions. A common exception thereto is the rule that a lay witness may state an opinion or a conclusion where the witness has knowledge of the facts upon which the conclusion is derived. Merely because a conclusion of fact may also have a legal significance would not necessarily make the opinion incompetent.

> *Sweet* v. *Tuttle*, 14 N. Y. 465, 471;
> *De Wolf* v. *Williams*, 69 N. Y. 621, 622;
> *Knapp* v. *Smith*, 27 N. Y. 277, 281, 282.

Mr. Kearns was examined before trial in the *Pasley* action in the presence of Ross Brown, president of the Newton Contracting Company, and George Williams, the

driver of the truck at the time of the accident (ff. 573-574). In his double capacity as president of the Kearns Coal Corporation (ff. 578-579) and as secretary of the Newton Contracting Company (ff. 620-621), Mr. Kearns was certainly qualified to testify as to which of the two companies was in control of the motor truck at the time of the accident.

Also, Mr. Kearns testified that he talked over and discussed all of the facts in the *Pasley* case with Ross Brown about the 3rd of January, 1934 (f. 600). The Court's order provided for the examination to be held on March 9, 1934. Kearns knew prior to the examination before trial that "the idea of the examination" was to see "who was in supervision of the truck when the accident happened." He says that to the best of his knowledge and belief he told the truth on that examination. He swore before a notary public that the answers given by him were true. He read his deposition over very carefully and knew that it was to be used on the *Pasley* trial (ff. 569, 570, 596, 600, 611-613). For all of these reasons the Kearns Coal Corporation was not prejudiced in the *Palsey* action. Its president on being examined before trial told the whole truth.

Petitioner, nevertheless, states that its main contention is not that Mr. O'Rourke, was negligent, but that he deliberately failed to protect the Kearns Coal Corporation. It is charged against this member of the bar that he was willing to lay a foundation for a subsequent disclaimer by his client, the defendant in this action. This charge is baseless. In making it, petitioner's counsel disregards the evidence on this record that both Mr. Kearns and Mr. Brown reaffirmed on the trial the truth of their testimony on the pre-trial examination (ff. 596, 693). The fact is also referred to in this record that Mr. Brown testified in the Pasley trial that "they timed the hiring from the

time that the truck got to Kearns to the time it returned to the garage" (f. 694).

Petitioner argues that the admissions which Mr. Kearns made on his examination before trial were a deciding factor in persuading the Trial Judge on the second trial of the *Pasley* action to deny the motions to dismiss the complaint. How can the petitioner fairly argue what the record in the underlying case would disclose when, by plaintiff's objections, that record when offered by defendant, both in parts and as a whole, was excluded by the District Court in the case at bar? We do not know what was in the mind of the Judge but we do know that the printed record of the second Pasley trial does not disclose any of the prejudice claimed by petitioner. A party may not profit on an appeal by an erroneous ruling which he himself induced the Court below to render.

> *Roche* v. *Nason*, 185 N. Y. 128; BARTLETT, *J.*, at page 135.

Petitioner's counsel in their brief erroneously state at pages 29-30 that the issuance by defendant of a certificate of insurance to Stephens Fuel Co., another retail coal dealer, indicated a knowledge that the trucks of the Newton Contracting Company were to be used to carry coal. No inference of any such purpose can be drawn from the issuance of a certificate of insurance. Such a paper is merely a statement that an insured, such as the Newton Contracting Company, has protected itself with automobile liability insurance. No charge is made for furnishing this information, and the so-called certificate of insurance extends no coverage whatever to anyone. It has no more effect than if the insurance company wrote a letter advising

the inquirer that the Newton Contracting Company or any other company had insured its trucks.

In this case the Newton Contracting Company, which was engaged in business as a paving contractor may have had a contract to pave the coal yard, the ramps or driveways of the Stephens Fuel Co. The certificate of insurance was informative only as to the contractor's automobile insurance coverage. That is what the defendant, as underwriters, would assume from such an inquiry. There is no evidence in the case, nor can it be assumed from such a certificate, that coal was carried by the Newton Contracting Co., for the Stephens Fuel Co.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 953

KEARNS COAL CORPORATION,
Petitioner,

against

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Counsel for Petitioner.

New York, May 10, 1941.

Appeal Printing Co., Inc., 130 Cedar St., New York

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IN THE

Supreme Court of the United States

No. 953

OCTOBER TERM, 1940

KEARNS COAL CORPORATION,
Petitioner,
v.
UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

A

Respondent's answer to the first point raised under "A" of the argument in petitioner's main brief is based entirely on the case of *Lavine* v. *Indemnity Insurance Company of North America*, 260 N. Y. 399. In that case, as pointed out in our main brief (p. 17) it appears from the printed record on appeal that the negligence action was commenced by the service of a summons and complaint upon the insured on August 10, 1929, which were forwarded to the defendant insurance company about a week or ten days later. The defendant insurance com-

pany never appeared nor answered on behalf of the insured in the negligence action and on September 12, 1929, about three weeks after it received the papers in the negligence action it disclaimed all liability. The insurance company did obtain a fifteen day extension of time to answer, which was signed only by plaintiff's attorneys and did not constitute an appearance nor an assumption of the defense of the action by the insurance company. The fact that the insurance company had neither appeared nor answered in the negligence action was stressed by its attorneys in their brief on the appeal.

This case upon which respondent relies and which was stated by the Circuit Court of Appeals in its opinion to be "the most nearly analogous case that we have found" is clearly distinguishable on the facts and is not in point. The insurance company in that case never assumed the control of the negligence action on behalf of the insured nor was the insured ever excluded from such defense and there was therefore no representation by conduct of the insurance company that the insured was covered by the policy nor any election by the insurance company to assume liability to the insured. The *Lavine* case did not change the law in New York State nor did it overrule the previous decisions cited by petitioner in its main brief (pp. 15 and 16). In fact the case of *Gerka* v. *Fidelity & Casualty Company*, relied on by petitioner and cited on page 15 of its main brief, is cited with approval by the Court of Appeals in the *Lavine* case.

In the case of *Weatherwax* v. *Royal Indemnity Company*, 250 N. Y. 281, cited in the *Lavine* case, the insurance company did interpose an answer on behalf of the insured, but with a reservation of all rights and a warning, prompt and unequivocal, to the insured that the insurer would withdraw if it found it had been prejudiced

by the dilatory notice of the accident, which reservation the court found the insured had assented to. The court upheld the subsequent withdrawal because of this reservation of rights. In the case at bar the assumption of the defense of the Pasley action by the respondent, United States Fidelity & Guaranty Company, was unequivocal and without reservation or condition.

The cases cited by respondent in the footnote on page 15 of its brief to the effect that a showing of prejudice is required before an equitable estoppel can arise are likewise beside the point. The question here is not whether prejudice is necessary to support an equitable estoppel, but whether prejudice will be presumed from the assumption by an insurance company of the defense of an action against the insured and the continuance of the insurer in control of that defense to the exclusion of the insured for a period of more than eight months. Our contention, which we submit is supported by the New York cases cited under point "A" in our main brief, is that prejudice under such circumstances will be presumed as a matter of law, or at the very least, that an issue of fact as to the existence of prejudice will result.

B

Respondent's counsel again urges, as he did in the argument before the Circuit Court of Appeals, that respondent was forced to appear and defend the Pasley action on behalf of the Kearns Coal Corporation because the time for that defendant to answer was about to expire. In the first place, this argument is wholly irrelevant and in the second place, it is not supported by the record. There was nothing in the conversation between Mr. Campbell of the Travelers and Mr. O'Donnell or Mr.

Dwyer of the United States Fidelity & Guaranty Company which indicated that Kearns Coal Corporation would not be taken care of by the Travelers if the respondent persisted in its refusal to defend. The conversation was a perfectly amicable business discussion between two insurance men as to which policy constituted the primary coverage and which company should defend the Kearns Coal Corporation in the Pasley action. Mr. Campbell took the position, in which he was supported by competent authority, that the Travelers policy was an excess policy so far as this truck was concerned.

Continental Casualty Co. v. *Curtis Publishing Co.*, C. C. A. 3rd Cir. 94 Fed. (2d) 710;
Commercial Casualty Ins. Co. v. *Hartford Accident & Ind. Co.*, 190 Minn. 528;
Maryland Cas. Co. v. *Bankers Ind. Ins. Co.*, 51 Ohio App. 323;
Grasberger v. *Liebert & Obert, Inc.*, 335 Pa. St. 491.

At the conclusion of the conversation the respondent's representative said that he would take the matter under consideration. Later he called back and said that they had decided to appear for Kearns Coal Corporation and to send them the summons (fols. 780, 781, 783, 784). There was nothing in the conversation, as testified to by Mr. Campbell or by Mr. O'Donnell, with respect to the time when the answer of the Kearns Corporation was due nor was there anything to indicate that there would be a default judgment obtained against Kearns Coal Corporation, regardless of the decision at which the respondent arrived. The letter advising respondent of the date when the answer was due, on which respondent's counsel and the court below in its opinion seem to lay stress, was not

written until after the respondent had made its decision to assume the defense (fol. 184).

If the situation was as suggested by petitioner's counsel when respondent assumed the defense of the Pasley action on behalf of Kearns Coal Corporation, or if respondent at that time had any reservations whatsoever with respect to its liability, it could have assumed the defense of the Pasley action with a reservation of its rights and put the insured and Travelers Insurance Company, which carried the excess insurance, on notice of that situation.

See:

Weatherwax v. *Royal Indemnity Co.*, cited under "A" (*supra*).

They then could have determined whether under those circumstances to entrust the defense of the Pasley action to the attorneys employed by respondent on behalf of all three defendants. Respondent, however, made no reservation whatsoever and its assumption of the defense of the Pasley action on behalf of Kearns Coal Corporation unequivocally and without reservation was a representation to all concerned that Kearns Coal Corporation was covered by respondent's policy and would be protected.

C

The argument of respondent under Point II of its brief to the effect that Kearns Coal Corporation was not an additional assured under the respondent's policy ignores entirely the question of estoppel. The jury specifically found that respondent at the time it assumed the defense of the Pasley action for Kearns Coal Corpora-

tion had knowledge of all the facts and circumstances relative to the custody, control and management of the truck at the time of the accident and that it also at that time had knowledge of the terms and conditions of the Travelers policy relative to its coverage on hired automobiles (fols. 1312, 1313). These findings were not, and on this record could not be, disturbed by the Circuit Court of Appeals. With knowledge of those facts respondent assumed the defense of the Pasley action on behalf of Kearns Coal Corporation without reservation, thus recognizing that company as an "additional assured" and by its conduct representing that it was covered and would be protected as an additional assured under the policy. Having done so and having continued in full control of the defense of that action through the attorneys whom it employed to represent all three defendants for a period of more than eight months, it was estopped to deny coverage to plaintiff as an additional assured. Coverage of an additional assured, as well as coverage of a named assured, may be predicated upon an estoppel, even where the risk involved was specifically excluded under the terms of the policy (see cases cited in petitioner's main brief, p. 29).

D

Respondent under Point IV of its brief argues that no actual prejudice resulted to petitioner from the assumption and conduct of the defense of the Pasley action by respondent. Even if we eliminate the question of the conduct of the examination of Mr. Kearns before trial, there was, we contend, under the New York decisions at least an issue of fact for the jury to determine whether prejudice to the petitioner resulted from respondent's assumption of the defense of the Pasley action and its con-

tinuance in the exclusive control thereof for a period of more than eight months. Moreover, actual prejudice resulted to petitioner from the conduct of the examination of Mr. Kearns before trial, as pointed out under "B" of petitioner's main brief.

The question whether the truck and driver at the time of the accident to the Pasley boy were under the supervision and control of Kearns Coal Corporation was not one on which Mr. Kearns as a lay witness was qualified to state an opinion or a conclusion, as suggested by respondent. An intelligent answer to this question required a knowledge of the New York law on supervision and control as between a special and a general employer. Moreover, the question was not one on which expert testimony of any kind was admissible, as it called for an opinion on the question directly in issue which was to be decided by the jury under instruction from the court as to the law.

> *Dougherty* v. *Milliken*, 163 N. Y. 527, 533;
> *Schutz* v. *Union Railway Co.*, 181 N. Y. 33, 37;
> *Noah* v. *Bowery Savings Bank*, 225 N. Y. 284, 292.

These questions were objectionable on the ground that they called for a conclusion of the witness, which is an objection as to form and was waived when not taken on the examination before trial.

> *New York Civil Practice Act*, Sec. 305;
> *New York Rules of Civil Practice*, Rule 129.

Objection on the trial to these questions as incompetent did not raise the point that they called for a conclusion of the witness.

Hellinger v. *Marshall,* 92 A. D. 607, 609;
Cahill v. *Torrey* (not officially reported), 121 N. Y. Supp. 598, 599.

It is clear that Mr. Kearns was under a total misapprehension as to what was necessary to constitute legal supervision and control of the truck and driver by Kearns Coal Corporation. His understanding was, as shown by the record, that if he told Williams where to take and deliver the coal, this constituted control of the truck and driver by Kearns Coal Corporation (pp. 593-595). This understanding was wholly erroneous. As stated by the New York Court of Appeals in *Charles* v. *Barrett* (cited in petitioner's main brief, p. 21):

> "Where to go and when might be determined for the driver by the commands of the defendant. The duty of going carefully, for the safety of the van as well as for that of wayfarers, remained a duty to the master at whose hands he had received possession."

The cases cited on page 23 of respondent's brief do not affect this question. They do not involve the question of supervision and control as between a general and a special employer, but merely hold that an employee who makes calls and deliveries, using his home as a base, is still considered to be engaged in the business of his general employer while returning to that base after completing his last call or delivery.

We do not charge the counsel who represented petitioner on the examination before trial with deliberate misconduct, as respondent's counsel suggests. The respondent having assumed control of the defense of the Pasley action on behalf of all three defendants and having employed the same counsel to defend all three,

both he and Mr. Kearns were entitled to assume that it made no difference whatsoever whether Kearns Coal Corporation or Newton Contracting Company was in control of the truck and driver at the time of the accident. The conduct of the examination was extremely prejudicial to petitioner, but only in the light of respondent's subsequent disclaimer.

CONCLUSION

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Of Counsel for Petitioner.

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MAY 23 1941
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IN THE

Supreme Court of the United States

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KEARNS COAL CORPORATION,
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against

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Respondent.

RESPONDENT'S REPLY BRIEF

WILLIAM DIKE REED,
WILLIAM J. MCARTHUR,
Counsel for Respondent.

New York, May 21st, 1941.

IN THE

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UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

RESPONDENT'S REPLY BRIEF

A

As pointed out in the opinion written by Circuit Judge CLARK for the United States Circuit Court of Appeals, for the Second Circuit, "this action has been brought to determine the ultimate responsibility, as between two insurance companies, for damages paid for personal injuries inflicted December 31, 1933." The insurance companies here referred to are the Travelers Insurance Company, which had issued a policy of automobile liability insurance to the petitioner, Kearns Coal Corporation, and the United States Fidelity and Guaranty Company, which had issued an automobile liability insurance policy to the Newton Contracting

Company, the owner of a motor truck which was rented to and used on the day of the accident in delivering coal in New York City for plaintiff Kearns Coal Corporation.

It is also noted in the opinion of the Circuit Court of Appeals that "plaintiff sues herein for Travelers' benefit to recover the sum paid to settle its liability * * *." After referring to the trial in the underlying action which resulted in a judgment on May 12, 1937, for the Pasleys against plaintiff herein for $36,855.02, which was compromised and satisfied on July 9, 1937, by the payment of $15,000, the opinion of the Circuit Court of Appeals reads:

> "Travelers advanced this sum to plaintiff upon the latter's agreement to prosecute this action in Travelers behalf."
>
> *Kearns Coal Corporation* v. *United States Fidelity & Guaranty Co.*, 118 Fed. (2d) 33, at 34.

It, therefore, appears that the Travelers Insurance Company is the real party in interest here. The petitioner is merely a nominal plaintiff which is suing for the benefit of its insurance company, which had written this policy of automobile liability insurance for the Kearns Coal Corporation, covering all of its hired automobiles (Ex. I, p. 413).

The cases of *Rosenblum* v. *Maryland Cas. Co.*, 153 App. Div. 23; *Rosenwasser* v. *Globe Indemnity Co.*, 224 N. Y. 561; *Gerka* v. *Fidelity & Casualty Co.*, 251 N. Y. 51, 57; *Utterbach Gleason Co.* v. *Standard Acc. Ins. Co.*, 193 A. D. 646; affirmed 233 N. Y. 549, cited by petitioner, are clearly distinguishable from the case at bar. In each of these cases, the defendant insurance company carried the actions of the assured through to a judgment or settlement. It is clear from reading these cases that the assureds in each

case were completely excluded from the control of the litigation either until a verdict was reached or a settlement achieved.

The estoppel in those cases arose not from the mere retention of the action for a short time by the insurance company but by the prejudice which resulted from the inability of the assureds to control the litigation. The insurers were unable to withdraw from the defense after such verdict or settlement because the settlement or verdict having been achieved, the assureds were no longer in a position to help themselves.

Thus in *Gerka* v. *Fidelity & Casualty Co., supra,* the Court, by HUBBS, *J.,* stated at page 57:

> "The defendant did not at any time offer to turn over the papers in the action to the insured. It continued with the defense of the action, paid the witness fees, conducted the trial, appealed to the Appellate Division and offered to pay the plaintiff a sum of money to settle the action."

And also in *Utterbach Gleason Co.* v. *Standard Acc. Ins. Co., supra,* the Court, by KILEY, *J.,* stated at page 653:

> 'Appellant kept in and defended the case; prepared and argued it upon appeal and took all chances, according to its theory upon respondent's money, until it was finally determined that someone must pay Caroline T. Willey for her injury. Then appellant refused to pay. It could not keep control of the action and thus gamble with the release, and its idea of suppression of evidence in a former action brought against a third party and covered by another's insurance contract."

But in the case at bar, the petitioner cannot complain of any loss of control of the litigation. This petitioner itself refused to accept control of its own litigation when

the defendant expressly offered that control to the petitioner (Plaintiff's Exhibits 23, 24, 26, pp. 375-382). The case of *Sachs* v. *Maryland Cas. Co.*, 170 App. Div. 494, cited by petitioner, is also clearly distinguished for this reason. This case stresses the fact that the assured was excluded from any control in the litigation.

The respondent here did not carry the defense of the Kearns Coal Corporation in the *Pasley* action to a judgment or settlement. That corporation was not denied the right to settle the case or assume charge of the litigation. The papers in the *Pasley* action were returned by the Fidelity Company to the Kearns Coal Corporation "for your personal attention or that of your insurance carrier" on October 24th, 1934 (Ex. 9, pp. 346-347).

The Travelers Insurance Company thereupon assumed the defense of the *Pasley* action on behalf of the Kearns Coal Company. The attorney, a Mr. Garvey, assigned to the case by the Travelers, came to the office of respondent, reviewed its entire file and took therefrom certain statements, photographs and other investigation material to assist him in the case (ff. 821-822). It was this attorney, George A. Garvey, designated by the Travelers Insurance Company, who acted as trial counsel for the Kearns Coal Corporation on the first trial of the *Pasley* action in March, 1935, and after the verdict on that trial was set aside again conducted the defense *de novo* on the second trial of the same case in May, 1937.

The final judgment on May 12th, 1937 in favor of the Pasleys against the Kearns Coal Corporation was therefore about two and one-half years after the respondent had disclaimed liability and returned the papers in the *Pasley* case to the plaintiff in the present action. During all of this time, the attorneys designated by the Travelers

Insurance Company, to act for Kearns Coal Corporation, were in exclusive control of its defense in that action. It is obvious that the petitioner here did have control of its own litigation in the accident case. No suggestion has ever been made by petitioner that this period of two and one-half years was insufficient time for its attorney to adequately prepare its defense. In the absence of any real complaint of loss of control of the underlying litigation, the normal and usual rule applied by the courts in New York State is that actual prejudice to an insured must first be shown before an estoppel can be claimed. (See cases cited on page 15 of respondent's brief.) The distinction here drawn was made by the New York Court of Appeals in the cause of *Knauss Inc.* v. *Indemnity Ins. Co.*, 270 N. Y. 211 at page 216, where the Court said, by CROUCH, *J.*:

> "There were no circumstances of estoppel or election by which the insured was denied the right to settle the case or assume charge of the litigation, as in *Brassil* v. *Maryland Cas. Co.* (210 N. Y. 235) and other like cases. There is no evidence or reason to infer that plaintiff was misled or prejudiced in any way."

And so in the case at bar, the petitioner must show more than mere delay on the part of respondent in making its disclaimer. It must show that it suffered actual prejudice by reason of defendant's conduct other than the fact of such delay. This it failed to do. It has been repeatedly held that mere delay in making a disclaimer will not estop an insurance company where such disclaimer leaves the assured with an adequate opportunity to defend the action, and the assured suffered no other prejudice in the interim.

Thus in *American Cereal Co.* v. *London Guarantee & A. Co.*, 7 Cir., 211 Fed. 96, the Court said at page 99:

> "But there is no estoppel unless plaintiff has been misled or injured * * *. If, in truth, 'after the trial' the submission of the *Overhouser* case was set aside and plaintiff came into charge of the defense *de novo,* and if defendant had been misled into undertaking the defense by plaintiff's representation that the building was being erected by an independent contractor in accordance with the terms of the Indemnity contract, when plaintiff was actually constructing the building itself, not only was there no injury suffered to plaintiff, but defendant was amply justified in withdrawing."

The Court in *Kitsap County Transportation Co.* v. *Pacific Coast Cas. Co.,* 67 Wash. 297, 301, also in a similar case, ruled as follows:

> "There was nothing to show that there was not ample time in which to obtain all the facts upon which a defense might be based, or that appellant could have done anything it did not do in support of its defense in the *Juul* case. * * * It was not competent for it to tell the jury it was injured and prejudiced in its defense."

The case of *Miller* v. *Union Indemnity Co.,* 209 App. Div., 455, 457, affirmed without opinion 240 N. Y. 627 and the case of *269 Canal Street Corporation* v. *Zurich Co.,* 226 App. Div. 516-518 affirmed without opinion 252 N. Y. 603 are distinguishable since both clearly involved questions of waiver and not estoppel. The distinction between waiver and estoppel is well fixed since waiver is a matter of intention which needs no prejudice to support it, whereas an estoppel must have prejudice to support it.

> *Draper* v. *Oswego County Fire Association,* 190 N. Y. 12, 16.

But in the case at bar, no claim has ever been made of waiver. In fact, petitioner argued in the Court below:

"This is not a case of waiver as in the *S. & E. Motor Company* case, which involves the question of intent. This is a case of estoppel by conduct" (Petitioner's Brief in Circuit Court of Appeals, p. 42).

B

There is ample evidence in this record to show that the Travelers Insurance Company at first refused to assume its rightful obligation to the Kearns Coal Corporation and defend it. On two occasions these refusals to appear were made even upon the express statement of the defendant, United States Fidelity and Guaranty Company, that the Kearns Coal Corporation was not insured under Newton's policy (Plaintiff's Exhibits 23, 24, 26; pp. 375-382).

The assurance given by Mr. Campbell in his conversation with Mr. O'Donnell, or Mr. Dwyer of the United States Fidelity and Guaranty Company that the Traveler's policy was an "excess policy only" was a misstatement of the facts. At the time of that conversation, no questions of estoppel by conduct was present. The United States Fidelity and Guaranty Company had done nothing as yet which could rise to any conceivable claim of estoppel. Neither could Mr. Campbell anticipate that any such claim would be made in the future. Also there existed at that time several complete defenses to any action brought by the Kearns Coal Corporation on the Fidelity Company's policy.

If the Kearns Coal Corporation had control of the truck at the time of the accident, this plus the fact that they paid $30 per day for the use thereof would have constituted a "renting" in violation of section IV(b) of the defendant's policy.

On the other hand if the Kearns Coal Corporation did not have control of the truck at the time of the accident, then it could not have been "operating" the truck so as to fall within the "omnibus Clause," section II(1) of the defendant's policy. Since no liability existed under the policy of the United States Fidelity and Guaranty Company, the only policy of insurance held by the Kearns Coal Corporation was that of the Travelers Insurance Company with its "Hired Automobiles Endorsement." Therefore, that policy could not have been and was not an "excess" policy. In the face of the false and misleading statement to this effect by Mr. Campbell, the Kearns Coal Corporation should be precluded now from raising any claim of estoppel against the defendant.

As was stated in the case of *Morrison* v. *Royal Indemnity Co.*, 180 App. Div. 709, at page 713:

> "The plaintiff cannot predicate an estoppel on the falsity of his own representation."

The correspondence between the parties indicates clearly that the United States Fidelity and Guaranty Company was cognizant of the danger of the impending default by the Kearns Coal Corporation. The correspondence indicated that unless some appearance was put in for the Kearns Coal Corporation, a default would result (see ff. 1125, 1131-1134, 1140). The letter of the Travelers Insurance Company, dated February 6, 1934, was an affirmative statement as to this fact which was most apparent since the summons in the *Pasley* action had been served on January 5th, 1934, and immediately sent by Kearns Coal Corporation to its insurer, the Travelers Insurance Company.

Whether or not a default would be taken against the Kearns Coal Corporation for failure to answer and appear in the *Pasley* action was of the utmost importance and not

"irrelevant," as petitioner suggests. Even aside from the obvious damage which such a default would have caused to the Kearns Coal Corporation, a default would also have seriously prejudiced the Newton Contracting Company. The Newton Contracting Company was the owner of the truck and its liability was a statutory and derivative one. It is apparent that a default against the Kearns Coal Corporation, with the admission of liability implicit therein, would necessarily have hampered and embarrassed the proper defense of the owner as well as the renter of the truck. The respondent helped, rather than harmed, the petitioner at this critical stage.

C

The cases of *Sauriolle* v. *O'Gorman,* 86 N. H. 39; *Horn* v. *Commonwealth Gas. Co.,* 105 N. J. L. 616; *Peterson* v. *Maloney,* 181 Minn. 437, cited by petitioner, do not sustain the proposition that a party which has no rights at all under a policy of insurance not issued to it, may become an "assured" thereof by alleging and proving an estoppel. In each of these cases, the party suing was the "*injured party.*" Under former section 109 of the Insurance Law of the State of New York, a statutory right was given to an "injured party" and to none other to bring an action against the insurance carrier of the judgment debtor. But in the case at bar, the Kearns Coal Corporation, not being an "injured party," had no statutory right on which to proceed. And, as demonstrated in Point II of respondent's brief, it likewise had no rights under the policy of insurance issued to the Newton Contracting Company, since the Kearns Coal Corporation did not fall within the definition of an "additional assured" as defined in Section II(1) of the policy. Being a stranger thereto, it had no right to claim any estoppel whatsoever against respondent.

CONCLUSION

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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WILLIAM J. MCARTHUR,
Counsel for Respondent.